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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

LOUISIANA POWER & LIGHT COMPANY,
Petitioner,

versus

CITY OF THIBODAUX,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner, Louisiana Power & Light Company (sometimes hereafter "Power Company"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on July 3, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. A1-A9), is reported at 373 F. 2d 870. Denial of rehearing was without opinion. The opinion of the District Court (Appendix B, *infra*, pp. B1-B26) is reported at 225

F. Supp 657. The judgments of the Court of Appeals are reproduced as Appendix C hereto.

JURISDICTION

The Opinion of the Court of Appeals was filed on March 6, 1967, a timely petition for rehearing was denied on June 23, 1967, and the judgment of the Court of Appeals was entered on July 3, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the District Court was invoked because of diversity of citizenship, the City of Thibodaux (sometimes hereafter "City") being a citizen of Louisiana and Petitioner being a citizen of Florida.

QUESTIONS PRESENTED

1. Does a vested franchise right have Constitutional protection against impairment of the obligation of contract?

2. Do the due process clauses of the United States and Louisiana Constitutions protect against the taking by a municipality of physical facilities and franchise rights without compensation therefor?

3. May a Federal Court sitting in a diversity of citizenship case permit an untimely filing (or no filing) of a deposit by an expropriating agency in the light of Federal Rules of Civil Procedure 71A (j) and (k) and 69, when there is a State law requiring that a deposit be made in a time certain after judgment?

4. In a diversity action based upon State eminent domain law requiring judicial determination of whether a taking is "necessary for a public purpose," when no showing or presumption of public purpose exists in the record, is the District Court required to follow State law and make

a specific finding on public purpose, or, if Federal law applies, is a determination of public purpose under the Fourteenth Amendment a judicial or a legislative function?

STATUTES INVOLVED

The statutes directly involved are: Rules 69 and 71A (j) and (k) of the Federal Rules of Civil Procedure; Louisiana Revised Statutes, Title 19, Section 101 et seq.; Louisiana Constitution, Artcile I, § 2, and Article IV, § 15; U. S. Constitution, Fourteenth Amendment; U. S. Constitution, Article I, § 10; Louisiana Revised Statutes, Title 33, § 151 et seq.; and § 171 et seq.

The above statutes appear in Appendix D hereto at pages D1-D13.

STATEMENT

This expropriation suit was instituted by the City in February 1957 in a State district court. The Power Company invoked federal diversity jurisdiction by reason of it being a citizen of Florida and the City a citizen of Louisiana, and removed the case to Federal District Court.

The District Court below appointed a commission to hear the evidence on quantum. Pursuant to full hearing, that commission issued a Report that, as of May 1, 1961, the physical facilities being taken were worth $165,654; that the franchise rights were worth $317,031; that severance damages were in the amount of $17,380; that consequential damages were in the amount of $99,575; and that the total award should be $599,640 (R. 880)

Because of a vacancy created when Judge J. Skelly Wright was elevated to the Court of Appeals for D.C., there was a lapse of several months in the progress of the case. That fortuitous lapse resulted in factual develop-

ments showing that growth projections of City engineers and Petitioner's expert witness were reasonable and accurate. Those factual developments consisted of substantial growths in customers and in revenues. Armed with that proof, Petitioner showed, on hearing of motions for new trial, that it was entitled to an award for its franchise rights based on the present value of future growth, an award which the commission had originally refused. (R. 985 et seq.) The District Court accordingly amended the commission award by adding an amount for the present value of future growth in the sum of $781,918, making the total award $1,381,558, and final judgment was rendered for that amount. (R. 1048)

Although the City appealed, no deposit of the award was made into the registry of the District Court, and, based upon a requirement in State law (La. Revised Statutes, Title 19, Section 107) that deposit be made within six months after judgment, Petitioner moved for dismissal of the appeal. Petitioner also moved for dismissal on ground that there had not been any showing made of necessary public purpose for the taking at any stage of these proceedings.

The Court of Appeals made no ruling on these motions to dismiss until it issued its opinion on the merits of the appeal, in which opinion both motions were denied. The Court affirmed the District Court judgment except as to the award for present value of future growth, all of which it excised. The basis for that reduction was a holding that the Power Company had no right under its franchise granted by Lafourche Parish (County) to serve any new customers in the area annexed by the City and which area was the subject of this expropriation, but could only continue serving those customers being served at the time of

the annexation. The net effect of that holding would be that the proven value of future growth within the Power Company's valid franchise would be taken without any compensation, and the City would be taking some $78,000 in physical facilities and about 88 customers added since May 1, 1961, (the time when valuation of facilities and franchise rights was originally calculated), without making any payment therefor.

REASONS FOR GRANTING THE WRIT

1.

THE IMPAIRMENT OF OBLIGATION OF CONTRACT

The Parish of Lafourche granted Petitioner a parish-wide franchise in 1927 which, at the time of hearing before the commission below, had some 64 years remaining. That franchise was accepted by Petitioner and exercised, there being some 828 customers served in the area in dispute at the time of hearing below. The Court of Appeals has held, in effect, that the 1954 City ordinance of annexation of the subject area and/or the City resolution of expropriation dated November 27, 1956 permits a reduction or diminution of Petitioner's franchise to the extent that it has no right to serve any **new** customers in its franchised area, but only such customers as it was already serving at the time of annexation.

That holding is in direct conflict with some of the best settled decisions of this Court, decisions which have established that a franchise, when accepted, is a vested contractual right. *Dartmouth College v. Woodward*, 4 Wheaton 518 (1819); *St. Tammany Water Works v. New Orleans Water Works*, 120 U.S. 64 (1887); *City of Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U.S.

58, 33 S. Ct. 988 (1913). The holding is even more directly in conflict with those decisions that say a vested franchise is a contract protected from impairment of its obligations by Article I, Section 10 of the United States Constitution. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650 (1885); *City of Louisville v. Cumberland Telephone & Telegraph Co.*, 224 U.S. 649, 32 S. Ct. 572 (1912); *Grand Trunk Western Railway Co. v. South Bend*, 227 U.S. 544, 33 S. Ct. 303 (1913). The above holding is further directly in conflict with *Russell v. Sebastian*, 233 U.S. 195, 34 S. Ct. 517 (1914), wherein this Court held that the nature of a franchise was such that,

> "When accepted and acted upon it would become binding—not foot by foot, as pipes were laid—but as an entirety, in accordance with its purpose and express language."

Identically here, the Petitioner's franchise cannot be viewed as becoming a binding right only customer by customer or foot by foot of cable. It was a binding right from the moment it was accepted by exercise.

The *Russell* case, *supra*, also makes clear that the Court of Appeals cannot rely on a state court ruling which interprets state or municipal legislation in such a way as to effect an impairment of the obligation of contract.

While it is true that Petitioner's parish-granted franchise of 1927 was taken subject to Louisiana law then in existence, the Court of Appeals was quite clearly in error to construe any such law as warrant for restricting Petitioner's franchise upon annexation to just those customers then served.[1] First, it must be noted that the 1954 annexa-

[1] The Court of Appeals error is not diminished by its reliance on a State Court of Appeals case, *Town of Coushatta v. Valley Electric Membership Corp.*, 139 So. 2d 822 (1962). That case is significantly distinguishable. Principally, the real point of law there was that the co-

Continued

tion ordinance and the 1956 expropriation resolution by the City were both many years after petitioner's franchise was granted in 1927. The source of the annexation ordinance was Act 315 of 1946 (R.S. 33:171, et seq.), also many years after petitioner's franchise had been granted. Secondly, even if *arguendo* an alternative annexation statute were considered, R.S. 33:151 et seq. (being Act 105 of 1892), together with R.S. 19:101 et seq. (being Act 111 of 1900, both of which antedate Petitioner's franchise, there would still be no justification for the holding below, there being not the slightest suggestion in either of those statutes of impingement or restriction on vested contract rights by annexation or expropriation. Thus do we inevitably reach *Detroit United Railway v. Michigan*, 242 U.S. 238, 61 L Ed. 268 (1916). There this Court squarely held that annexation statutes passed subsequent to a franchise grant could not impair the obligations of that contract. In principle, to the same effect is *East Louisiana RR Company v. City of New Orleans, supra.* Moreover, *Detroit United Railway* also held in accord with *Russell, supra*, that impairment was attributable to the construction of those annexation statutes as well:

> "But in this case there were state laws passed subsequent to the making of the alleged contracts in question, in the form of the legislation of 1905

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[1] (Continued)
operative being enjoined from serving a municipally annexed area despite its parish franchise *had not exercised that franchise* in that it was serving no customers in the annexed area prior to annexation. Consequently, the franchise was not a vested contractual right and the municipality was thus privileged not to give it effect. McQuillin, Municipal Corporations, Vol. 12 (3d Ed.), Section 34.06; *City of New Orleans v. Great Southern Tel. & Tel. Co.*, 40 La. Ann. 41 (1888); *East Louisiana R.R. Co. v. New Orleans*, 46 La. Ann. 526 (1894). To interpret the *Coushatta* case otherwise would do violence to the above well-established principle of franchise law as restated by McQuillin. Such an interpretation would do mischief by inviting the taking without compensation of important franchise rights through the device of annexation. Moreover, *Coushatta* is at odds in principle with a long-established Louisiana Supreme Court decision, *State ex rel. Jefferson City Gas Light Co. v. City of New Orleans*, 41 La. Ann. 91 (1889).

and 1907 extending the corporate limits of the city. And it is not correct to say that the decisions of the state court turned upon the mere meaning of the contracts without reference to those subsequent laws. Assuming what in effect is conceded, that the village and township franchises constituted contracts within the protection of the Federal Constitution, the force of the decisions was to abrogate the rights acquired by plaintiff in error through its acquisition of the suburban lines, not merely because of the assent of the owners of the city lines to the ordinances of January 3, 1889, but because of the combined effect of those ordinances and the acts of the legislature of Michigan that thereafter extended the city limits. It is true that no question is or can be here made respecting the authority of the legislature to add new territory to the city; and it is likewise true that the annexation acts contain no reference to existing contracts, nor any specific mention of the subject matter of street railway rights. But, in cases of this character, the jurisdiction of this court does not depend upon the form in which the legislative action is expressed, but rather upon its practical effect and operation as construed and applied by the state court of last resort, and this irrespective of the process of reasoning by which the decision is reached, or the precise extent to which reliance is placed upon the subsequent legislation."

The holding of the Court of Appeals is thus in direct conflict with the *Detroit Railway* case. In view of the many conflicts with decisions of this Court herein described, it is of no particular moment that the decision below is also in conflict with another decision of that Court, *City of Meridian v. Southern Bell Tel. & Tel. Co.*, 256 F. 2d 83 (1958), vacated on other grounds.

2.

THE TAKING WITHOUT COMPENSATION

On the motion for new trial in the District Court, it was shown that during the period from the original valuation in April 1961 to September 30, 1962, there had been a growth of 42 customers and a consequent increase in revenues. (R. 987) Of course, by 1967, when this matter reached the Court of Appeals, there were even more customers (88) in the affected area, together with substantial plant additions ($77,754) to serve the additional customers. The Court of Appeals decision to excise any award on present value of future growth would leave Petitioner in the position of receiving no compensation for the additional customers and property additions.

A correction by this Court of the impairment of contract error will make academic the issue of compensation for facilities and customers added since 1961. But, if—perish the thought—that error is not corrected, then the question of a taking without compensation, contrary to U.S. and Louisiana Constitutional protections, inescapably arises. It is too well settled to require extensive citation that a franchise is a vested property right (*Frost v. Corporation Commission*, 278 U.S. 515, 49 S. Ct. 235), and property is protected Constitutionally from being taken without compensation. *Hot Springs RR Company v. Williamson*, 136 U.S. 121, 10 S. Ct. 955 (1890).

The record here is clear that the award thus far granted relates to values set as of May 1961 and does not include the facilities and customers since added. Judge Wright contemplated that such additions would receive an additional value. (R. 125) The error by the Court of Appeal regarding the City's failure to make timely deposit, discussed hereinafter, relates to this issue. La. R.S., Title

19, § 107 sets up an arbitrary time limit of six months after judgment for the municipality to make deposit of the amount decreed to be paid. That is a sensible rule in that its observance would obviate a utility company being placed in a position of adding facilities and customers after judgment — which it must do in Louisiana as a public service corporation — for which it does not get paid or, alternatively, must seek relief in the U. S. Supreme Court. Had the City here deposited the amount decreed and taken the Petitioner's system, customers, and rights to serve in the City, then there would have been no need for this plea for relief from an unconstitutional taking without compensation, since the City would have been adding the facilities and serving the new customers.

3.

THE QUESTION OF DEPOSIT AND F.R.C.P. 71A (j) and (k) and 69.

When this Court had before it and considered this case previously under its 1959 decision rendered in the case of *Louisiana Power & Light Company v. City of Thibodaux*, reported at 360 U.S. 25, it recognized fully the principle of comity in diversity of jurisdiction cases, requiring the Federal District Court sitting in this case to follow the Louisiana law on eminent domain, as may be interpreted by the State courts. Petitioner's complaint here is that the Court of Appeals vastly departed from the State law by its failure of refusal to apply the significant and pertinent provisions of the Louisiana statute on eminent domain. Specifically, the Court below refused to maintain Petitioner's motion to dismiss this case on appeal by the City, said motion being based on Louisiana law making the judgment of null and void in its entirety due to the City's neglect or refusal to make a timely post-judgment deposit

of the amount stated therein, as required by Louisiana Revised Statutes, Title 19, Section 107, providing as follows:

> "Whenever any gas, electric light, or water works plant encumbered with mortgages or privileges of any kind is expropriated by any municipality, it passes to the municipality free and clear of all incumbrances. However, the amount decreed to be paid therefor shall be paid by the corporation into the court within six months from the date of final judgment therein and distributed to the mortgage and privileged creditors according to their priority. In the event the municipal corporation fails to pay the amount fixed by the judgment of expropriation within six months after its rendition, the judgment becomes null and void and the municipality is liable for all damages suffered by reason of its failure to comply with the terms of the expropriation judgment."

"Shall" in Louisiana is mandatory, not permissive. La. R.S. 1:3.

The judgment of expropriation fixing the amount of the award for the mortgaged property of Petitioner was rendered by the Federal District Court on August 26, 1964 and filed on September 1, 1964. The City neither obtained a stay order from that final judgment nor made the post-judgment deposit of the amount fixed by said judgment within the time period before forfeiture of the said judgment as a nullity under Louisiana law.

On January 27, 1966, the Petitioner filed with the court below a motion to dismiss the appeal of the City on ground that the judgment on which the appeal was taken is null and void due to the City's default in not making the post-judgment deposit required in eminent domain cases

under and pursuant to the Louisiana statute relied upon by the City in filing this suit. The initial response of the Court of Appeals to this motion was merely a minute entry on February 18, 1966, to the effect that the motion to dismiss would be "carried with the case". The only other reference by the Court below to Petitioner's motion to dismiss this case on appeal based upon the nullity of the final judgment of expropriation under Louisiana law is a brief comment in Footnote Three of the lower court's opinion, as follows:

> "The other motion is based on the theory that the city has defaulted by not making a post-judgment deposit pursuant to the requirements of La. R.S. § 19:107, where mortgaged property is involved. This motion is also denied. The parties stipulated in 1957 that the proceeding would be governed by Rule 71A, F.R. Civ. P. That rule contemplates pre-judgment deposits and also permits post-judgment deposits. Cf. *Atlantic Seaboard Corporation v. Van Sterkenberg*, 4 Cir. 1963, 318 F. 2d 455; *United States v. Hirsch*, 2 Cir., 1953, 206 F. 2d 289. These deposit provisions are not applicable in the circumstances of this case." [373 F. 2d 870, at 871, fn. 3]

Although the Court below alludes to the stipulation of the parties to be governed by Rule 71A of the Federal Rules of Civil Procedure, it is significant to note that its statement concerning the effect of that Rule is incomplete and completely erroneous. Initially it must be observed that the Notes of the Advisory Committee show that the Federal Courts sitting in diversity cases must follow state law as to deposits when such deposits are required thereunder. As well stated in Note to Subdivision (j):

> "Whatever the substantive law is concerning the necessity of making a deposit will continue to govern. For statutory provisions concerning deposit in court in condemnation proceedings by the United

> States, see U.S.C.A., Title 40, [former] § 258a; U.S.C.A., Title 33, § 594—acquisition of title and possession statutes referred to in note to subdivision (a), *supra*. If the plaintiff is invoking the state's power of eminent domain the necessity of deposit will be governed by the state law. For discussion of such law, see 1 Nichols, Eminent Domain, 2d ed. 1917, §§ 209-216. For discussion of the function of default and the power of the court to enter judgment in cases both of deficiency and overpayment, see *United States v. Miller*, 1943, 63 S. Ct. 276, 317 U.S. 369, 87 L. Ed. 336, 147 A.L.R. 55, rehearing denied 63 S. Ct. 557, 318 U.S. 798, 87 L. Ed. 1162 (judgment in favor of plaintiff for overpayment ordered)."

and Note to subdivision (k):

> "Any condition affecting the substantial right of a litigant attached by state law is to be observed and enforced, such as making a deposit in court where the power of eminent domain is conditioned upon so doing. (See also subdivision (j)). Subject to this qualification, subdivision (k) provides that in cases involving the state power of eminent domain, the practice prescribed by other subdivisions of Rule 71A shall govern."

In reading the cases of *Atlantic Seaboard Corporation v. Van Sterkenberg*, and *U. S. v. Hirsch*, *supra*, cited by the Court below, it is quite evident that, while the said Rule contemplates pre-judgment deposits, it does not, on the other hand, permit untimely post-judgment deposits unless there is no other statute requiring such deposits to be made. Only in those cases where the law is silent may the Federal courts permit a post-judgment deposit at any time following the entry of the judgment of expropriation while an appeal is pending. See *U. S. v. Hirsch*, 206 F. 2d 289, at 294-295 (2nd Cir. 1953):

> "Hirsch argues that the deposit was not in accord with the Declaration-of-Taking Act, 40 U.S.C.A. § 258a. We agree, since the deposit was made after judgment. But we consider that contention of no significance. For we have here the ordinary case where, without recourse to a statute, a judgment-debtor tenders, by a deposit in court, with leave of the court, for the benefit of the judgment-creditor, all or part of the amount due under the judgment, at the same time appealing. The deposit, whether or not the judgment-creditor draws it down, is deemed payment pro tanto. If a judgment is reversed on appeal, the judgment-debtor becomes entitled to restitution of money he paid on the judgment; he has the right whether or not he asserted that he had when he paid the money."

See also *Atlantic Seaboard Corporation v. Van Sterkenberg*, 318 F. 2d 455, at 460 (4th Cir. 1963):

> "We think the Court had abundant authority for its order. It is true that Rule 71A (j) appears to refer only to pre-judgment deposits 'required by law as a condition to the exercise of the power of eminent domain * * * [or] permitted by statute.' Inherently, however, the condemnation court possesses the power to authorize immediate entry by the condemnor upon the condemned premises, and, it may, for that purpose and for the protection of the owner, permit or require the payment of the amount of the award into the registry of the court. There is no valid reason why an owner, dissatisfied with the amount of the award, should be allowed, by a fruitless and meritless appeal, to postpone indefinitely the condemnor's enjoyment of the premises, imposing upon the condemnor great, perhaps, irreparable, damage, all without risk of further loss or injury to the owner."

In the instant case, however, the Louisiana statute under which the City proceeds clearly makes a timely post-

judgment deposit mandatory under penalty of forfeiture of the judgment of expropriation as null and void.

Under the judicial interpretations of Rule 71A, more particularly sub-paragraph (j), post-judgment deposits are permissive by the courts **only in the absence of other law applicable thereto.** The lower court erred in failing or refusing to grant Petitioner's motion to dismiss the appeal based upon the nullity of the judgment of expropriation under the **mandatory** provisions of Louisiana law requiring post-judgment deposits in eminent domain cases, because the Federal courts in diversity of jurisdiction cases are required to follow and apply local or State law under the *Erie-Tompkins* doctrine and its progeny. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938); *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 65 S. Ct. 1464 (1944); and *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 69 S. Ct. 1233 (1948).

The lower court's refusal to apply State law requiring the timely post-judgment deposit under penalty of forfeiture of the judgment of expropriation as null and void is in conflict with standing decisions of this Court. In the *Guaranty Trust Co.* case, *supra*, this Court stated as follows:

> "But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State." [326 U.S. 99, at 108-109]

In *Brillhart v. Excess Insurance Co.*, 316 U.S. 491, at 497 (1941), this Court stated that the legal effects of a

judgment should be determined by the local or State law, when Federal courts are exercising jurisdiction solely on the basis of diversity of citizenship.

In *Angel v. Bullington*, 330 U.S. 183, at 191-192 (1946), this Court stated:

> "The essence of diversity jurisdiction is that a federal court enforces State law and State policy. If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment. North Carolina would hardly allow defeat of a State-wide policy through occasional suits in a federal court. What is more important, diversity jurisdiction must follow State law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld."

Also, *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221 (1949).

Further, the lower court's refusal to grant Petitioner's motion to dismiss the appeal, based upon the nullity of the judgment of expropriation due to the City's failure to make a timely post-judgment deposit as required by Louisiana law, is in conflict with a decision of another Court of Appeals. In the case of *Defoe v. Town of Rutherfordton*, 122 F. 2d 342, at 345, the Fourth Circuit Court of Appeals held that a Federal court exercising jurisdiction based on diversity of citizenship of the parties "may not arbitrarily accord to the municipality what is in effect a moratorium for the payment of its obligations" under a judgment where to do so would be in conflict with State law.

In addition to the error below in the unwarranted departure from the *Erie-Tompkins* doctrine and its progeny by failing to apply State law requiring timely post-judgment deposits in eminent domain proceedings, this Court should also consider the serious question involving proper administration of the Federal judiciary under Rule 69 of the Federal Rules of Civil Procedure.

Rule 69 applies to judgments rendered by the Federal district courts. *U. S. v. Hacket*, 123 F. Supp. 106, at 107 (D.C. Mo., 1954), wherein it is stated:

> "By virtue of Rule 69 of Federal Rules of Civil Procedure, 28 U.S.C.A., the procedures on execution of a judgment of a Federal Court are those that accord with the practice and procedures of the state in which the Federal Court is held."

U. S. v. English Const. Co., 95 F. Supp. 763, at 764 (D.C. N.Y. 1951), wherein it is stated:

> "The enforceability of a judgment of a United States District Court depends upon the practice applicable to a judgment of the court of the state in which the District Court is located."

Also, Barron and Holtzoff, Federal Practice and Procedure, §§ 1481-1482, pp. 525-529.

The lower court's refusal to grant Petitioner's motion to dismiss this case at the appellate level when the judgment of expropriation was forfeited under the provisions of Louisiana law by the City's default and failure to make the timely post-judgment deposit raises a grave question as to the breakdown of the proper functioning of the Federal judiciary. Under Rule 69, the Federal courts are required to follow and apply the State law of procedure for the enforcement of judgments rendered by the courts in their exercise of diversity jurisdiction, and in this case

the lower court erred in failing to enforce the penalty of forfeiture of the judgment of expropriation as null and void in accordance with State law due to the City's default by failing or refusing to make mandatory post-judgment deposit. Thus, the decision below raises a vital question as to the proper function of the Federal judiciary in eminent domain cases based on local or State law, and clarification by this Court is needed and required.

4.

THE ERROR RE: PUBLIC PURPOSE

Upon abstention by the District Court in this case, the City brought a declaratory judgment action in State court to determine its "right" to expropriate the facilities of Louisiana Power & Light Company under Louisiana Revised Statutes 19:101 et seq. The Louisiana Court of Appeals for the First Circuit, in ruling on the action, specifically noted that its ruling was solely on the "right" of the City to expropriate, and the court made no ruling on the question of the public purpose for the taking, stating:

> "Appellant next contends that there has been no finding of necessity for this appropriation. On this point, the petition for expropriation alleged that it was ' * * * necessary for the public interest * * * and necessary in the public interest.' The requirement under Act 111 of 1900 is that the expropriation be ' * * * thought necessary to the public interest by the mayor and council of municipality.' While the petition satisfies the requirements of the Act, we are not, in fact, concerned therewith as the only question before this Court is the right of the City to expropriate under Act 111 of 1900, now L.S.A.-R.S. 19:101, et seq., within the city limits." [126 So. 2d 24, at 42]

Thereafter, at the trial on the merits of this matter.

before the District Court, the **only** evidence adduced with respect to necessity for a public purpose on the part of the City was its admission against interest in connection with its 1956 bond issue, as follows:

> "The City can negotiate freely with the Power Company, since the connection of this new area to the Municipal System is not essential to provide adequate debt-service coverage for the present bond issue." (Seal Ex. C-2, p. 12)

The evidence of record indicates that the facilities to be taken by the city for use in its proprietary capacity would serve the same customers being served by Louisiana Power & Light Company at rates higher than those charged by the Company. Absent any contrary showing in the record, it is submitted that the evidence establishes *prima facie* that the taking is contrary to the public interest. Yet the District Court and the Court of Appeals both failed to rule on the question of necessity for a public purpose.

A.

Louisiana Law Requires Judicial Determination.

Article I, § 2 of the Louisiana Constitution provides that, "Private property shall not be taken except for public purposes." Article IV, § 15 provides, "Nor shall vested rights be divested, unless for purposes of public utility."

The Louisiana courts have consistently held that the quoted language from the State Constitution requires a determination by the courts of the state in expropriation proceedings that there be a finding that the taking is "necessary for a public purpose," and the owner who claims lack of public necessity is entitled to have the question passed upon by a judicial tribunal. *Calcasieu and Sou. Ry. v. Bel*, 254 La. 269, 69 So. 2d 40 (1953); *City of Westwego v. Marrero Land and Imp. Association*, 221 La. 564, 59 So.

2d 885 (1952); *Parish of Iberia v. Cook*, 238 La. 697, 116 So. 2d 491 (1959); *City of New Orleans v. Maeglich*, 169 La. 1, 126 So. 675 (1930); *City of Shreveport v. Kansas City Southern Ry. Co.*, 169 La. 1085, 126 So. 667 (1930); *Kansas City Southern Ry. Co. v. Meyer*, 166 La. 663, 117 So. 765 (1928); *New Orleans Terminal Co. v. Teller*, 113 La. 733, 37 So. 624 (1904); *Williams v. Judge*, 45 La. Ann. 1295, 14 So. 57 (1893); *United Gas Pipeline Co. v. Blanchard*, 149 So. 2d 615 (La. App. 1963), cert. den., 244 La. 135, 150 So. 2d 590 (1963); *Louisiana Power & Light Company v. Charpentier*, 165 So. 2d 614 (La. App. 1964).

In *United Gas Pipeline Co. v. Blanchard, supra*, the appellate court stated at 149 So. 2d 616:

> "The determination of the question in expropriation cases as to whether taking is for public purposes or use is **strictly** a judicial function and the determination of the question is the **duty** of the court." (Emphasis added)

Absent a State Constitutional amendment to the contrary (such as that contained in Article VI, § 19.1 of the Louisiana Constitution, authorizing State Highway Department determination of necessity), Louisiana courts are thus **required** to make a specific finding on necessity for a public purpose or use in expropriation cases such as this. It is submitted that no less stringent a requirement should be placed on a Federal District Court sitting as a State Court in a diversity action.

In *Hairston v. Danville and Western Ry. Co.*, 208 U.S. 598, 28 S. Ct. 331 (1908) this Court held that, where the state law of Virginia permitted no exercise of the right of eminent domain except for public uses, a general judgment of condemnation by a state court will be assumed to

be a judicial determination of "necessity for a public use" even if there was no specific finding of that fact. The situation is different, however, in the instant case in that Louisiana law requires a specific judicial determination that the exercise of the right was "necessary for a public purpose or use." Accordingly, to permit a Federal District Court to enter a judgment without such a specific determination would violate the rule of *Erie Ry. Co. v. Tompkins, supra; Guaranty Trust Co. of New York v. York, supra; Angel v. Bullington*, 330 U.S. 183, 67 S. Ct. 657 (1946); and *Ragan v. Merchants Transfer and Warehouse Co., supra*, that a Federal Court in a diversity case is merely sitting as another court of the state.

B.

State or Federal Interpretation of "Necessary for a Public Purpose" under Fourteenth Amendment.

This Court has held that a State legislature may confer upon a municipality the authority to determine the necessary public purpose for itself. *Josland Co. v. City of Providence*, 262 U.S. 668, 43 S. Ct. 684 (1923). But such determination must be made in accordance with State law. *Bragg v. Weaver*, 251 U.S. 57, 40 S. Ct. 62 (1919). As indicated above, Louisiana law requires a judicial determination that necessity for a public purpose exists, and under the teachings of *Erie* and its progeny, the District Court should be required in a diversity action such as this to follow State law in making such a determination. The court below chose not to make a finding on the question of public purpose, and its only justification therefor would appear to be the holding of this court in *Rindge v. Los Angeles County*, 262 U.S. 700, 43 S. Ct. 689 (1923), and *Milheim v. Moffat Tunnel Imp. District*, 262 U.S. 710, 43 S. Ct. 694 (1923), to the effect that Federal courts are

vested with the duty of determining for themselves what is a public purpose under the due process clause of the Fourteenth Amendment, and are not bound by the rulings of State courts thereon.

Thus, the failure of the District Court to make a finding on public purpose in this diversity case based on Louisiana law clearly poses a conflict as to whether the court is bound by Federal or State interpretations of what is required for due process under the Fourteenth Amendment. It is submitted that the lower court's choice of following what would be assumed to be Federal law by failing to enter such a ruling directly conflicts with the rule of *Erie*.

C.

Legislative or Judicial Determination of "Public Purposes."

It is well settled that the Fourteenth Amendment to the Federal Constitution has established a requirement that property must be taken for public purpose. *Missouri Pacific Ry. Co. v. Nebraska*, 164 U.S. 403, 17 S. Ct. 130 (1896); *Davidson v. New Orleans*, 96 U.S. 97, 24 L. Ed. 616 (1877).

In applying the provisions of the due process clause of that amendment to State law eminent domain proceedings, a further problem has arisen on whether legislative or judicial determination is required on the question of whether the taking is "necessary for a public use." The scope of judicial power to determine a "public use" in a Fourteenth Amendment controversy is the subject of conflicting decisions by this Court. In *Hairston v. Danville and Western Ry. Co.*, *supra*, this Court stated that, "The nature of uses, whether public or private, is ultimately a **judicial** question," in a Fourteenth Amendment context.

In *Hairston*, this Court assumed that judicial determination of necessity for a public purpose was implicit in the Virginia State Court's general judgment of condemnation. However, Louisiana state law requires a specific judicial determination on this point, as discussed above. On the other hand, in *United States ex rel. T.V.A. v. Welch*, 327 U.S. 546, 66 S. Ct. 715 (1946), stating specifically that it was not attempting to ascertain whether the scope of the judicial power to determine what is a "public use" in Fourteenth Amendment controversies is the same as under the Fifth Amendment, a majority of this court held in a decision involving the Federal Government that, "It is the function of * * * [the legislative branch] to decide what type of taking is for a public use."

The Court of Appeals in the instant case appeared to rely on this Court's holding under the Fifth Amendment that legislative determination of public purpose is all that is required, rather than following the ruling of the Court in the Fourteenth Amendment case of *Hairston* requiring a judicial determination of the public purpose question, in a manner similar to Louisiana law.

In summary, the action of both lower courts in failing to rule on the question of whether the taking was "necessary for a public purpose" raises the following questions:

(1) Whether State or Federal guidelines should be followed in diversity actions in determining whether a specific finding of public purpose is required;

(2) Whether State or Federal guidelines should be followed in determining what is "necessary for a public purpose" under the due process clause of the Fourteenth Amendment; and

(3) If Federal law is to be applied, the additional question of whether such a determination is a judicial or legislative function under the due process clause of the Fourteenth Amendment.

These are questions as to which conflicting decisions appear to have been rendered by this Court, and they are questions important to the orderly functioning of Federal diversity jurisdiction within the framework of Federal-State eminent domain proceedings under the *Erie* rule.

* * * * *

In addition to and apart from the significant conflicts with this Court's decisions, and the important questions relating to Federal judicial functions in eminent domain cases based on State law, we submit that the issues here have even more importance. The questions raised by a municipality expropriating an electric distribution system from an electric utility company are entirely matters of first impression in Louisiana and virtually throughout the nation. The issues as to value of future growth; as to whether a public purpose is achieved in simply transferring ownership of an electric system to another person charging higher rates to the same customers; as to whether a municipality should be permitted to carry on a lengthy litigation without putting any deposit forward while the utility company is under regulatory requirements to continue building facilities and serving customers for none of which it may be paid if the municipality later decides the original "price was right"; are all of vital importance to the utility industry, to the municipalities and similar governmental bodies, and to the consumers, in Louisiana and across our whole nation. The guidance of this Court on these matters is needed and indicated.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

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